SUBMISSION TO THE LAW REFORM COMMISSION OF NOVA SCOTIA ON THE ENFORCMENT OF MAINTENANCE OBLIGATIONS

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PREFACE

The Nova Scotia Advisory Council on the Status of Women was established in 1977 to monitor women's issues and to act as an advisory body to the provincial government.

Specifically, the Council is legislated to:

- advise the Minister upon such matters relating to the status of women as are referred to the Council for consideration by the Minister responsible for the Administration of the Status of Women Act;
- bring to the attention of the Minister matters of interest and concern to women.

In carrying out its duties, the Council may:

- receive and hear petitions and suggestions concerning the status of women;
- undertake and recommend research on matters relevant to the status of women;
- recommend and participate in programs concerning the status of women;
- propose legislation, policies and practices to promote equality of opportunity and status;
- publish reports, studies and recommendations.

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INTRODUCTION

The Nova Scotia Advisory Council on the Status of Women welcomes this opportunity to respond to the discussion paper by the Law Reform Commission of Nova Scotia with respect to enforcement of maintenance obligations. In general, the Advisory Council supports the proposed changes and looks forward to the provincial government's adoption of the majority of the Commission's recommendations. In particular, the Advisory Council considers that the following recommendations are the strengths of the Commission's document:

- A unified family court, as proposed by the Nova Scotia Court Structure Task Force;
- The creation of a maintenance enforcement office to provide automatic maintenance enforcement, and increased powers for enforcement officers, with the exception of forgiving arrears;
- The recognition of the need for a judicial education component in the maintenance enforcement program, and for the formulation of explicit, consistent, and clear policy guidelines for all provincial and Family Court judges and proposed enforcement officers;
- The provision that if a person misses one maintenance payment any available income will automatically be garnished without a court hearing and without the opportunity for the defaulter to make excuses for the nonpayment; and
- The broadened definition of "income source" and the obligation for the defaulter's income source to make the required deductions.

The Advisory Council's response to the discussion paper will focus on those few areas which remain a concern, and which will unfairly impact on the lives of Nova Scotian women and their children. The Advisory Council's concerns centre on the following issues respecting maintenance enforcement:

- There is no recognition by the Law Reform Commission that enforcement of maintenance obligations is a gendered issue;
- There is no requirement that filing of maintenance orders be mandatory;

- The proposal does not include a formula for determining maintenance payment amounts; and
- Acceptable reasons for a payor or maintenance debtor to have maintenance payments lowered are not explicitly stated.

MAINTENANCE ENFORCEMENT: A GENDER ISSUE

The vast majority of maintenance recipients or creditors are women (the majority of whom are single mothers), while the vast majority of maintenance payor or debtors are men[1] (the majority of whom are noncustodial, nonfamily individuals or are remarried[2]). Men who head single-parent families generally have higher incomes than single mothers, in keeping with the wage gap for all women and men (presently at approximately 65 cents on the dollar). Single mothers with children under the age of 18 who were receiving maintenance payments had incomes 45 to 56 percent higher than those who were not receiving payments.[3] The Advisory Council believes it is important to acknowledge the impact that maintenance defaulting has on the quality of life and financial status of women and their dependent children.

Not only do women make less to begin with and bear more of the financial responsibility for children after divorce or separation, they are also treated unfairly by a taxation system which requires them to claim maintenance as income, while the payor can claim payments as deductions from net income[4] (and regardless of whether or not he actually has paid the amount,[5] since it is the Advisory Council's understanding that

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[1] In 1988, men represented less than two percent of those receiving some form of alimony or maintenance (Diane Galarneau. "Alimony and Child Support," *Perspectives*. Statistics Canada, Summer 1992, p. 10).

[2] Ibid., p. 11.

[3] Ibid., p. 14.

[4] D.E. Pask and M.L. McCall. *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support*. Canadian Research Institute for Law and the Family, 1989.

[5] In Canada in 1988, there was a $2 billion difference in the amount of maintenance recipients reported receiving and the amount payors reported paying (Galarneau, p. 11). While some of this amount may be explained by some women not filing tax returns

tax returns are not cross-referenced, and are not accessible to maintenance enforcement personnel). If it is truly believed that both parents are responsible for the financial support of their children, then such support should be neither a tax burden nor a tax write-off. If couples continue to live together and support children, the money they spend on them can not be claimed as a tax deduction except in cases where a third party is paid for child care. The present tax system considers the noncustodial parent to be the "real" parent, while the custodial parent is treated as a paid child minder.

MANDATORY FILING OF MAINTENANCE ORDERS

The Advisory Council strongly believes that the filing of maintenance orders must be mandatory regardless of whether or not "both parties agree otherwise." Individuals with extant maintenance orders should automatically have their orders registered.[6] While the Advisory Council does not know how many fathers in Nova Scotia default occasionally or regularly on their maintenance payments, the amount of maintenance attempted to be collected through the presently available enforcement procedure is over $18 million,[7] and that 6,798 maintenance defaulters were not located or did not respond

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because their income was too low, an equally plausible explanation is that some men may claim to have paid maintenance amounts that they, in fact, did not pay.

[6] There has been some concern about the ability of maintenance enforcement legislation to withstand constitutional challenges to the *Charter of Rights and Freedoms*. On this issue we must concur with the National Association of Women and the Law: "[T]he state interest in eliminating poverty for the collective of women and children supersedes the state interest in protecting the privacy rights of an individual....[T]he Supreme Court of Canada has articulated in a variety of cases that legislation must use the least intrusive means to achieve its purpose. It is clear that the previous support enforcement legislation was not working and that these more direct measures are required. Therefore, there is no less intrusive means of achieving the goal of protecting the economic security of women and children than the proposed direct support deduction mechanism." (Nicole Tellier. *Brief on Bill 17: An Act to Amend the Law Related to Enforcement of Support and Custody Orders* submitted to the Standing Committee on the Administration of Justice, Ontario. National Association of Women and the Law, February 1991, p. 6).

[7] *Nova Scotia Maintenance Enforcement Annual Report*, 1990/1991.

to their summonses.[8] We do know that other jurisdictions experience defaults as much as 60-75 percent of the time.[9] In a national study it was found that "only two-thirds of women receive their payments regularly and only 54 percent receive them either on time or usually on time,"[10] and in Ontario "three-quarters of all family support isn't being paid the way it should be."[11] There is also some evidence to show that areas with higher unemployment and economic distress may have increased numbers of defaulters.[12] Nova Scotia certainly fit this category compared to most other Canadian provinces.

A woman may agree to the nonfiling of the order for all kinds of reasons, many of which may not be in her best interest. In fact, it is difficult for us to imagine a situation where it is not in the mother's interest to have the order registered. Research indicates that the regularity and amount of maintenance payments generally deteriorates over time. In other words, men who initially pay the full amount of maintenance in a timely fashion will not necessarily continue to do so a number of months or years after the initial order or agreement.[13] In addition, women's level of satisfaction with the original maintenance order deteriorates over time, which "might indicate that women may possibly agree to an order of child support and regret it later, when they become more fully aware of what it is costing to maintain the children and how much better off they perceive their ex-

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[8] Nova Scotia Department of Community Services, Family Court Enforcement Services *Consolidated Statistical Report for the Fiscal Year 1990/1991*. In Ontario there may be as many as 90,000 unpaid support orders representing $470 million in delinquent payments (*Canadian HR Reporter*, "Payroll Deductions for Family Support to Start Next Spring," Vol. 4 (38): 6, December 19, 1991.)

[9] Law Reform Commission, 1975; Canadian Institute of Law Research and Law Reform. *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, Edmonton, Alberta, 1981.

[10] Department of Justice Canada. *Evaluation of the Divorce Act*. Phase II: Monitoring and Evaluation, May 1990, p. 89.

[11] Ontario Women's Directorate and Ontario Family Support Plan public awareness campaign, November 1992.

[12] Department of Justice Canada. *Evaluation of the Divorce Act*. Phase II: Monitoring and Evaluation, May 1990.

[13] Canadian Institute of Law Research and Law Reform. *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, University of Alberta, 1983.

husbands to be relative to themselves."[14] A recipient may be able to opt into the program if she later experiences maintenance default, but only after the maintenance debtor has not paid, and only after she and her children have experienced the impact of nonpayment.[15] In Ontario, where support orders are automatically entered into the system unless the person receiving the support specifically opts out, only 39 percent of those who were not using the enforcement system said they had opted out. Half of the nonusers said they had not opted out, and the remainder (11 percent) were unsure about whether they had opted out or not.[16] Obviously, there is a lot of confusion about this option, and most of the women who are on record as having opted out did not informedly or consciously decide to do so. This is of enormous significance in planning a maintenance enforcement program that is in the interests of women and their children.

We have seen that women who are in abusive relationships do not always press charges or may seek to have assault charges dropped when the onus is on them to bring the abuser to justice. The responsibility for pressing charges has been clearly and necessarily transferred to the police for this reason, resulting in a situation where the abuser can not hold his partner or ex-partner accountable for the charge, and can not seek to influence, intimidate or threaten her into dropping the charge in compliance with his wishes.

In the same way, women seeking maintenance make decisions to try to keep the peace, to demonstrate her trust or cooperation with an ex-partner, or because she has been intimidated into doing so by her children's father,[17] either through his threats to her

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[14] Department of Justice Canada. *Evaluation of the Divorce Act. Phase II: Monitoring and Evaluation*, May 1990, p. 85.

[15] Nicole Tellier. *Brief on Bill 17: An Act to Amend the Law Related to Enforcement of Support and Custody Orders* submitted to the Standing Committee on the Administration of Justice, Ontario. National Association of Women and the Law, February 1991.

[16] Department of Justice Canada. *Evaluation of the Divorce Act*. Phase II: Monitoring and Evaluation. May 1990, p. 87.

[17] Nicole Tellier. *Brief on Bill 17: An Act to Amend the Law Related to Enforcement of Support and Custody Orders* submitted to the Standing Committee on the Administration of Justice, Ontario. National Association of Women and the Law, February 1991.

person or to the arrangement they have made regarding custody of the children. Putting the onus on the judiciary to forbid opting out by particular individuals is an inadequate solution; there is no way for the judge to determine whether or not the woman is being intimidated into agreeing to forgo filing the maintenance order unless the woman tells him/her, and she will not disclose such information if she has been intimidated.

She may also feel, based on past experience, that the system does not work for her and that it is not worth the effort to file the maintenance order, or perhaps she may feel her ex-partner simply cannot afford to pay child support.[18] One of the concerns of the Law Reform Commission is that "Family Court Enforcement Offices are not used as much as they could be."[19] This can only be the result of insufficient public education by the enforcement offices, or a lack of understanding of the service (or a lack of faith in the service) on the part of the creditor. These difficulties would be remedied in a mandatory filing system.

Making filing mandatory also allows the proposed Office of the Director of Maintenance Enforcement to automatically determine and add cost of living increases to maintenance payments on a yearly basis, in much the same way that property values are increased for the purpose of calculating municipal taxes.

FORMULA FOR DETERMINING PAYMENT AMOUNTS

Assessing various formulae for the purpose of determining appropriate maintenance amounts is beyond the scope of this submission. The Advisory Council will be responding in October 1992 to two reports of the Federal/Provincial/Territorial Family Law Committee dealing with child support, *Child Support: Public Discussion Paper* and *The Financial Implications of Child Support Guidelines*. The Advisory Council hopes that consensus will be reached with regard to a formula for determining maintenance amounts, and that this formula will be adopted at both the federal and provincial levels with regard to legislation that deals with divorce, separation, and common-law unions.

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[18] Department of Justice Canada. *Evaluation of the Divorce Act*. Phase II: Monitoring and Evaluation. May 1990.

[19] Law Reform Commission of Nova Scotia, *Enforcement of Maintenance Obligations: A Discussion Paper*, July 1992, p. 13

Without a formula or clear guidelines of some sort, women and their children are at the inconsistent mercy of individual ex-partners, maintenance enforcement officers, and judges.

CLARIFICATION OF REASONS FOR MAINTENANCE CESSATION OR REDUCTION

There is a great deal of controversy and inconsistency regarding the reasons a maintenance payor or debtor may legitimately excuse himself from payment of monthly maintenance or arrears. This situation must be clear and consistent for all those involved in maintenance decisions, including the parents, the judges, and the proposed Enforcement Officers. As the Law Reform Commission notes, there is some evidence to suggest that in general defaulters do not pay maintenance, not because they are not able to pay, but because they do not want to pay, and consequently simply refuse to pay.

The Law Reform Commission has stated that "a new enforcement system will not seek to extract money from individuals who do not have the money to pay,"[20] however, it must be remembered that women who have responsibility for the support of their children must find a way to pay for their needs regardless of whether or not she truly has the money to pay. In other words, the maintenance creditor is left with the burden of finding a way to reduce her own needs to ensure that her children are provided for to the best of her ability. The payor, if he makes the correct argument, may be excused from such dilemmas. The Advisory Council agrees that "support for one's children should take precedence over car payments and other material debts."[21]

The Advisory Council believes that there are no adequate reasons for forgiving arrears, since under the proposed model there should be no opportunity for substantial arrears to accumulate. The acceptable reasons for reduction of maintenance may include being laid off from work, becoming disabled with respect to employment, or reaching the age of mandatory retirement; in these cases, a reduced amount of maintenance can still be paid from unemployment insurance premiums, disability payments, or retirement or

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[20] Ibid., p. 2.

[21] Correspondence, Bryony House (a transition house for battered women and their children located in Halifax), March 5, 1992.

pension benefits. Quitting or taking early retirement should not be acceptable ways of reducing maintenance amounts, since continued financial support of one's children should take priority over other decisions. The issue of whether a second (or third) family should legitimately reduce the financial support available to the first is a difficult one; practically speaking, available resources should be equably distributed among all existing children although, ideally, the presence of already existing children from a previous relationship that must be financially supported would serve to generate some caution regarding the feasibility of starting another family.

If there are situations where it is deemed acceptable to reduce the amount of monthly maintenance payments, then the onus must be on the payor to apply to have the amount reduced by the courts in advance of actually reducing the payments. In other words, a defaulter should under no circumstances be given the opportunity to "explain" a nonpayment or a reduced payment if he has not first applied to the courts to have the amount changed, has given a satisfactory reason for the reduction, and has had the reduction approved.

The circumstances under which it would be acceptable and reasonable for the maintenance recipient to ask for a variation in the maintenance amount must also be explicitly stated. She may not realize that if she is laid off from her job, becomes disabled with regard to employment or ability to do child care, or retires, she is justified in seeking an increase in the maintenance order.

TRACKING SYSTEM

A detailed tracking system is a vital component to the proposed Office of the Director of Maintenance Enforcement. We need to know how many regular and occasional maintenance defaulters there are in the province; whether or not the proposed maintenance enforcement program is working efficiently; the number of awards for maintenance and the amount of the award; and how many times and how successfully various enforcement options are being requested or ordered (applications to have the amount increased or decreased, accumulation of arrears, garnishment of wages, imprisonment of defaulter).

Questions which remain unanswered in the Law Reform Commission's discussion paper:

- As the proposal now stands, will individuals who are receiving social assistance be allowed to "opt out" of the maintenance filing system?
- Will a computerized, province-wide tracking system be set up concurrent with the establishment of the proposed office of the Director of Maintenance Enforcement?
- What, if any, mechanisms will be put in place to locate maintenance defaulters who move to other jurisdictions in an effort to avoid enforcement?
- Not all custodial parents ask for or are awarded maintenance for dependent children, for a variety of reasons. Overall, there appears to have been a deterioration in the average amount of child support awarded during the past few years, and the amount of support awarded per child declines progressively the more children there are in the family.[22] Even before maintenance enforcement arises as an issue, what will be done to ensure that individuals who need maintenance will be awarded adequate amounts?

RECOMMENDATIONS

The Nova Scotia Advisory Council on the Status of Women recommends that:

1. The Law Reform Commission recognize that maintenance enforcement is a gendered issue;
2. The filing of maintenance orders be mandatory, with no opportunity to opt out of the maintenance enforcement program, even if both parties are agreed;
3. Extant maintenance orders be automatically filed;
4. Maintenance cheques should be ordered to be paid to the court on a 12-month basis (postdated) and then automatically paid to the recipient;
5. The payor be allowed only one late or missed payment before being required to participate in an automatic wage deduction plan–where deductions will be made from the payor's income by the employer (if the defaulter is employed), will be subject to income garnishment (if the defaulter is receiving unemployment, pension, or disability benefits), or will have assets seized and sold (if the defaulter is self-employed);

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[22] Department of Justice Canada. *Evaluation of the Divorce Act*. Phase II: Monitoring and Evaluation. May 1990.

6. Maintenance payments should not be considered income or deductions for income tax purposes;
7. Cost-of-living increases should be automatically added to maintenance payments by the Office of the Director of Maintenance Enforcement;
8. The Office of the Director of Maintenance Enforcement adopt a formula for determining appropriate maintenance amounts, as well as guidelines for acceptable reasons for maintenance cessation or reduction;
9. Maintenance payments should take precedence over other material debts;
10. Maintenance arrears should not be forgiven under any circumstances; and
11. A detailed tracking system should be implemented as soon as the Office of Maintenance Enforcement is established.